

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- :

MICHAEL SCHLUSSEL, :

Defendant. :

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JOHN F. KEENAN, United States District Judge:

USDC SDNY
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No. 08 Cr. 694 (JFK)

Memorandum Opinion and Order

Following a jury trial, Defendant Michael Schlusssel ("Schlusssel" or "Defendant") was convicted of conspiracy to commit mail fraud and mail fraud. On July 30, 2009, he was sentenced to 108 months' imprisonment and restitution of \$646,750. By summary order dated July 7, 2010, the Court of Appeals denied his appeal from the conviction and sentence. See United States v. Schlusssel, 383 F. App'x 87 (2d Cir. 2010). The Supreme Court denied certiorari on November 1, 2010. See Schlusssel v. United States, 131 S. Ct. 534 (2010). Schlusssel now moves for a reduction of sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure and/or to compel the Government to file such motion on his behalf on the basis of substantial assistance he claims to have provided to the Government. Specifically, Schlusssel argues that he discovered national security information regarding a terrorist recruiting cell in Brooklyn, which he passed on to federal agents who allegedly interviewed him in prison in January 2010. He has

also embarked on an extensive letter writing campaign to various law enforcement and Cabinet officials in an attempt to secure early release from prison in exchange for this information.

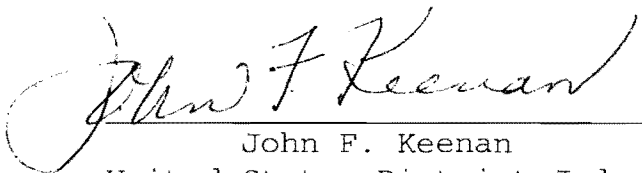
Rule 35(b)(2) authorizes the court to reduce a defendant's sentence as a result of his substantial assistance "[u]pon the government's motion made more than one year after sentencing." By its own terms, Rule 35(b) relief is only available when the Government determines that the cooperation provided by the defendant warrants such a motion. See United States v. DeFeo, No. 90 Cr. 250, 2008 WL 2557425, at *4 (S.D.N.Y. June 26, 2008) ("Section 5K1.1 and, by extension, Rule 35(b), give the Government a power, not a duty, to file a motion when a defendant has provided substantial assistance."); United States v. Rasco, No. 88 Cr. 817, 1991 WL 150525, at *2 (S.D.N.Y. July 26, 1991) ("[T]he court may not, sua sponte, without a motion from the government, reduce defendant's sentence under Rule 35(b)."). The Government maintains that it has never requested or encouraged Defendant's efforts to cooperate, and it apparently has no intention of filing a Rule 35(b) motion. Absent an application by the Government, the Court cannot and will not revisit Defendant's sentence. Moreover, where, as here, the defendant and federal prosecutors never entered into a cooperation agreement, the Court's ability to review the prosecutors' decision not to move under Rule 35(b) is limited to

circumstances where "the refusal was based 'on an unconstitutional motive,' such as the defendant's race or religion." United States v. Suarzo, No. 96 Cr. 450, 2000 WL 1558737, at *2 (S.D.N.Y. Oct. 18, 2000) (quoting Wade v. United States, 504 U.S. 181, 185-86 (1992)). Defendant has made no allegations suggesting improper motives. Therefore, Defendant cannot obtain the relief he seeks under Rule 35(b).

Should Defendant wish to pursue a collateral attack of his sentence on the basis of his purported assistance to the Government he must do so under 28 U.S.C. § 2255. Defendant explicitly requested that the Court not recharacterize the instant motion as a petition for habeas corpus, and the Court will honor that request. The instant motion for a reduction of sentence pursuant to Rule 35(b) is denied.

SO ORDERED.

Dated: New York, New York
July 19, 2011


John F. Keenan
United States District Judge